UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 24

Colegio de Técnicos de Refrigeración y Aire Acondicionado de Puerto Rico

Employer

and

Case 24-RC-082214

Unión de Empleados del Colegio de Técnicos de Refrigeración y Acondicionado De Puerto Rico

Petitioner

HEARING OFFICER'S REPORT AND RECOMMENDATION ON CHALLENGES AND OBJECTIONS

This report contains my findings and recommendations regarding two challenged ballots and an objection filed by Unión de Empleados del Colegio de Técnicos de Refrigeración y Acondicionado De Puerto Rico ("Union" or "Petitioner") to a secret ballot election conducted on July 3, 2012 (all dates are 2012, unless otherwise specified). The Tally of Ballots, which was served upon the Petitioner and Colegio de Técnicos de Refrigeración y Aire Acondicionado de Puerto Rico ("Employer") at the conclusion of the election, showed the following results:

Approximate number of eligible voters	4
Void ballots	0
Votes cast for Petitioner	1
Votes cast against participating labor organization	1
Valid votes counted	
Challenged ballots	2
Valid votes counted plus challenged ballots	
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Included: All system analysts and secretaries employed by the Employer at is facility in

San Juan. Puerto Rico.

Excluded: All other employees, guards and supervisors as defined by the Act.

¹ In a Stipulated Election Agreement entered into by both parties, and approved by the Regional Director on June 11, 2012, the Petitioner and Employer stipulated to the following bargaining unit description, which describes those employees who were eligible to vote in the July 3, 2012 election:

The tally of ballots reflected that challenges are sufficient in number to affect the results of the election.

On July 10, Petitioner filed objections² alleged to have affected the results of the election. On August 7, the Regional Director issued a *Report and Recommendation on Objections and Challenges and Notice of Hearing* in which she concluded that the challenged ballots and a Petitioner's objection raised substantial and material issues which would best be resolved at a hearing. Pursuant to the Regional Director's Notice, the undersigned conducted a hearing on the objection in San Juan, Puerto Rico, on August 22, August 28 and September 4. All parties were afforded a full opportunity to be heard, present evidence and cross-examine witnesses, to introduce evidence bearing upon the issues and to provide oral argument³.

During the course of the hearing⁴, Petitioner requested that its challenge to Elba Z. Villegas' ballot be withdrawn. The Employer stated on the record that it had no objection to the withdrawal of Petitioner's challenge to Villegas ballot. I hereby recommend to the Board that the withdrawal of Petitioner's challenge to Villegas ballot be approved in accordance with the Petitioner's request at the hearing. Further, the Employer, during the course of the hearing, requested that the challenge to the ballot cast by Union representative Francisco Clemente be withdrawn. The Union stated on the record that it had no objection to the withdrawal of Clemente's ballot. I hereby recommend to the Board that the withdrawal of the Employer's challenge to Clemente's ballot be approved.

The Objection

Petitioner contends that the Notice of Election was not posted at least 72 hours prior to the election. The Employer denies this, and contends that it posted the Election Notice as soon as it arrived by mail. Further, the Employer alleges that the Union's President, Francisco Clemente, was absent from work due to a work related accident days before the election held on July 3, and thus not present at the Employer's facility during the notice posting period.

Upon the entire record in this proceeding, and from my observations of the witnesses, as described in greater detail below, I make the following findings of fact, conclusions, and recommendations.⁵ I find that the Employer failed to timely

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² Two other objections were overruled by the Regional Director and no exceptions were filed to said decision.

³ In a hearing on challenges/objections, parties do not have a right to file briefs. Thus, I did not permit the parties to file post-hearing briefs. See National Labor Relations Board Casehandling Manual Part Two Representation Proceedings Section 11430. At the hearing, both the Petitioner and the Employer presented closing arguments.

⁴ The hearing was conducted under a rule of sequestration of witnesses, which applied to all witnesses who actually testified except for Daniel Crespo Serrano and Francisco Clemente, who served as the Employer's and the Union's representatives, respectively.

⁵ Although not every bit of evidence or every argument is specifically addressed, I have nonetheless considered all matters. To the extent that testimony or other evidence not specifically mentioned might appear to contradict my findings, it is because such evidence or testimony has

comply with its obligation to post the Election Notice as set forth in Section 103.20 of the Board's Rules and Regulations, and I recommend Petitioner's Objection be sustained, and the election be set aside and a second election be held in the event that, after opening and counting the ballots cast by Villegas and Clemente, a majority of the ballots were not cast for the Petitioner. The Petitioner's Objection No. 1 concerns the Employer's alleged failure to post the Election Notice at least 72 hours prior to the election.

1. The Facts

The Employer is a non-profit Institution created by virtue of Law 36 of May 20, 1970 of the Commonwealth of Puerto Rico, creating a compulsory Board of Examiners which administers the state licensing exam, certifications for aspiring refrigeration technicians, and provides for compulsory membership. The Employer provides certification services, dues collection and medical plan to its members. The Employer employs a total of four employees; three of which are secretaries, and one systems analyst.

The Petitioner's Evidence

The Petitioner presented one employee witness, Francisco Clemente⁶, Union President, in support of this objection. Clemente works as a System Analyst at the Employer, beginning in about February of 2002. Clemente testified that he met with the Employer's representatives on June 8th in order to sign the Stipulated Election Agreement setting forth the terms for the election to be held on July 3rd. The Stipulated Election Agreement provides that the Election Notice must be posted at least three working days prior to 12:01 a.m. of the day of the election. Clemente testified that on June 28, 2012 he went to work at approximately 7:30 a.m. or 8:00 a.m., and worked until 5:00 p.m. in the afternoon. In order to check if the Notice of Election was posted, he walked around the office checking different areas of the Employer's facility. Clemente testified that he did not see the Notice of Election posted before he left work that day. The next morning, he visited the Workmen Compensation Board offices, and after that, arrived at the Employer's around 2:00 p.m. When he arrived at the Employer's, the power was out. At 4:00 p.m., the Employer authorized the employees to leave. Clemente testified that even though there was no electric power at the Employer's, he was able to see and walk around the office, and the Notice of Election was not posted. On July 2, the Monday before the election, Clemente testified that he went to the Workmen Compensation Board office in

been rejected as not credible or of little probative weight. Unless otherwise indicated, credibility resolutions have been based on my observations of the testimony and demeanor of the witnesses at the hearing. 3-E Company v. NLRB, 26 F. 3d 1, 3 (1st cir. 1994); NLRB v. Brooks Camera, Inc., 691 F. 2d 912, 913 (9th Cir. 1982). All witness testimony has been considered even though I may not detail all conflicts in testimony. Bishop and Mapco, Inc. d/b/a Walkers, 159 NLRB 1159, 1161 (1966).

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⁶ Francisco Clemente's testified in an honest and forthright manner.

the morning, and arrived at work approximately at 2:30 or 3:00 pm. Upon arriving at work, he submitted some documentation to the Employer, but remained at the Employer's conference room until approximately 5:00 p.m. waiting for his wife, who also works for the Employer to end her work shift. That day, Clemente did not see the Notice of Election posted. The next day, July 3rd, the scheduled day of the election, Clemente testified that he was at the Employer's to cast his vote, and at that time, the Notice of Election had been posted.

The Employer did not cross examine Clemente.

The Employer's Evidence

The Employer presented two witnesses who testified regarding this objection: Daniel Crespo Serrano (Crespo), the Employer's President and Carmen Alicia Arroyo Gomez (Arroyo), the Employer's secretary.

Crespo testified that once the daily mail is received, if it is addressed to him, it is placed on his desk for his review upon his arrival at the office. As soon as he saw the National Labor Relations Board envelope placed at his desk, he immediately opened it, and placed two Notices of Election close by the employee's punch clock nearby the employee's lunch area. Crespo was unable to state the date when he received the Notices on the mail, or when he posted the Notices of Election⁷. In addition, Crespo testified that the Notices are geared for companies with a high number of employees who need to be notified of an impending election. In this case, Crespo testified that, since all four eligible employees voted in the election, everyone was duly notified. Crespo testified that Clemente was away from the office on June 28 and June 29, and therefore is unable to testify as to when the Notices were posted during the time required.

During cross examination, Crespo stated that on June 8, he met with a Board Agent at the National Labor Relations Board, Region 24, and signed a Stipulated Election Agreement, setting forth an election date of July 3rd. Crespo admitted that this Agreement required him to post copies of the Election notice at least three (3) full working days prior to 12:01 a.m. on the day of the election, that is, no later than June 28, at 12:01 a.m. During cross examination Crespo was evasive and sometimes refused to answer questions directly. Crespo testified that he received the Notice of Election by mail, and that the National Labor Relations Board envelope containing the Notice was postmarked June 14th. After that, as soon as he received it, he immediately opened it and affixed the Notice of Election in a wall next to the punch clock and in the employees' lunch area. Crespo admitted that he saw Clemente on the afternoon of June 28, when he signed the required documents for Clemente to report a work related injury to the Workmen Compensation Board.

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⁷ The Employer and the Union reached a Stipulation whereas they agreed that the National Labor Relations Board envelope containing the Notice of Election was postmarked June 14, 2012.

The Employer also presented witness Carmen Alicia Arroyo Gomez⁸, secretary, in support of its position regarding the objection filed by the Union. Arroyo testified that she is a secretary at the Employer's and voted at the election held on July 3rd. Regarding the posting of the Notice of Election, she testified that she knew of the election in advance because both the Employer and the Union called her at her home to inform her. Arroyo could not testify as to the date the Notice of Election was posted, and could only recall that it was posted a week in advance of the election. I try to elicit more details as to her recollection, but she was unable to recall any specific date when she saw the Notice of Election posted. When I asked her to describe the Notice, she stated it was "big with letters in black and it was white".

2. Analysis and Conclusion

Based upon my consideration of the above facts, I recommend that this objection be sustained. The Petitioner successfully demonstrated that the Employer failed to comply with the Board's three day notice posting rule.

On June 8, a stipulated election agreement was entered into setting forth an election date of July 3rd. Paragraph 8 of that agreement required the Employer to post copies of the election notice in "conspicuous placesat least three (3) working days prior to 12:01 a.m. of the day of the election." The agreement further stated that failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

On June 14th, the Regional Office mailed copies of the election notices for posting to the Employer. In the matter at hand, the election took place on July 3rd. The Notices were required to be posted no later than 12:01 a.m. on Thursday, June 28. Thus, the 3 working days before the election included Thursday June 28; Friday, June 29; and Monday, July 2. However, Employer's President Crespo admitted that he did not recall the exact date that he posted the Notices. Union President Clemente testified that he never saw a Notice posted during the three days prior to the election. The Employer's two witnesses failed to state the exact date when the Notices were actually posted. Accordingly, I credit the testimony of Clemente and I find that the Employer failed to timely post the Notices of Election in accordance with Rule 103.20. The Board's rule regarding posting of Notice of Election, 29 CFR Section 103.20⁹ (Rule 103.20) reads as follows:

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⁸ I do not find Carmen Alicia Arroyo Gomez testimony sufficiently reliable to be able to support any findings.

⁹ As noted in the explanatory statement for Rule 103.20, the official Board Notice of Election contains important information with respect to employee rights under the Act. Such information should be conveyed to the employees far enough in advance of the election so that employees will be adequately advised of their rights. Establishing a specific length of time for posting is

- (a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the date the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.
- (b) The term working day shall mean an entire 24-hour period excluding Saturdays, Sundays and Holidays.
- (c) A party shall be stopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting if it notifies the Regional Office at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.
- (d) Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69 (a).

The Board has made clear that this posting requirement is mandatory in nature. <u>Terrace Gardens Plaza, Inc.</u>, 313 NLRB 571, 572 (1992). As explained <u>in ELC Electric, Inc.</u>, 344 NLRB 1200, 1217 (2005), the failure to comply with the notice requirement is an *ipso facto* ground for setting aside an election. See also <u>Watkins Security Agency</u>, 357 NLRB No. 189 (2012).

The Employer appears to argue that the times and places of the election were known to the four eligible employees, and that his failure to recall the exact date of posting is inconsequential, as even if the Notice was not timely posted, such an omission did not have an impact had no impact on the results of the election because all of the eligible employees voted. The Employer's arguments concerning the actual number of employees who actually voted do not constitute grounds for excusing compliance with the rule and certifying the election results. Rule 103.20 is strictly enforced. Smith's Food and Drug, 295 NLRB 983 (1989).

For the official notices to have been timely posted in this case, they needed to be posted prior to 12:01 a.m. on June 28, 2012. Because the Employer failed to post the notices during the required period, I recommend that the Objection be sustained, and the election be set aside and a new election be conducted in the event that, after opening and counting the ballots cast by Villegas and Clemente, a majority of the ballots were not cast for the Petitioner.

meant to clarify to the parties their responsibilities and obligations with respect to notice posting and discourage unnecessary and time consuming litigation on this issue.

Conclusion and Recommendation

Having recommended that the request to withdraw the challenges to the ballots of Villegas and Clemente be approved, and that the Petitioner's Objection has merit, I recommend that the election be set aside and a new election be conducted in the event that after opening and counting the ballots cast by Villegas and Clemente a majority of the ballots were not cast for the Petitioner.

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570.

Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges that are not included in this Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append the submission to the Board copies of the evidence timely submitted to the Regional Director and not included in this Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding. The filing of exceptions to this Report may also be submitted by electronic filling.

Pursuant to the Board's Rules and Regulations, Sections 102.111-102.114, concerning the Service and Filling of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, DC by close of business on October 10, 2012, at 5:00 p.m. (ET), unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically. If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period in which to file 10. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

¹⁰ A request for an extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Filing exceptions electronically may be accomplished by using the E-filling system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab and then click on the E-filing link on the pull-down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

DATED at San Juan, Puerto Rico, on September 25, 2012

Maria Margarita Fernandez, Hearing Officer National Labor Relations Board, Region 24 525 F.D. Roosevelt Avenue, Suite 1002 San Juan, PR 00918-1002